

L A B O R R E L A T I O N S B U L L E T I N
F O R
S U P E R V I S O R S

HEADQUARTERS, JOINT READINESS TRAINING CENTER
AND FORT POLK
FORT POLK, LOUISIANA 71459

LRB 1-02

3 January 2002

This bulletin is intended to provide information and guidance to managers and supervisors on labor relations matters and is not intended for general distribution

**Right to Representation During Examination
in Connection With an Investigation**

1. Article III of the Negotiated Agreement between Fort Polk, Louisiana and NAGE Local R5-168 communicates the employee right to representation set forth in Section 7114(a)(2)(B) of Title VII of the Civil Service Reform Act. The provision, commonly referred to as the "Weingarten Rule," confers representation rights in certain investigatory examinations which employees reasonably believe could lead to disciplinary action being taken against them.

a. Section 5 of the provision provides in pertinent part:

"The Union shall be given the opportunity to be represented at any examination of a unit employee by a representative of the Employer in connection with an investigation if:

a. The employee reasonably believes that the examination may result in disciplinary action against the employee; and

b. The employee requests representation."

b. Section 6 sets forth employee responsibilities during investigatory examinations. It provides:

"Employees are expected to fully cooperate with an agency investigation and any failure to do so may subject the employee to disciplinary action."

c. The role of the Union steward during an investigatory examination is set forth in Section 8. It provides:

"The steward must be on site in a prompt and timely manner so as not to impede the investigation. When

LRB 1-02

3 January 2002

a Union steward is present, the employee will be permitted to consult the steward; however, the steward is not entitled to answer on behalf of the employee or to bargain with the Employer regarding the results of the investigation. This does not preclude the steward from clarifying questions, eliciting responses, submitting documentary evidence or suggesting other employees who may have knowledge of the matter."

d. Finally, Section 9 of the provision obligates Management to notify the employee of the purpose of the investigation prior to its commencement. It provides:

"Prior to the commencement of an investigatory examination, the employee will be informed of the purpose of the investigation."

2. The following information is provided to assist managers and supervisors in administering the above provisions:

a. The initial determination that a meeting with a bargaining unit employee is, in fact, an investigatory examination rests with the management official or supervisor conducting the examination. Once this determination is made, the supervisor must inform the employee of the purpose of the examination prior to its commencement. Once informed, the burden is on the employee to request representation by the Union. In handling the Weingarten rule, it is important to remember that the right arises only when the employee requests representation. The employee may waive that right by simply not requesting assistance from the Union.

b. Determining whether a meeting is an investigatory examination can be difficult. Generally, it means that the supervisor must be questioning or interrogating the employee about something that could lead to a disciplinary action (e.g., repeated tardiness, alleged abuse of leave, alleged irregularities on a travel voucher). The employee's right to request representation is limited to those situations where the employee reasonably believes the examination may result in a disciplinary action being taken against him or her. This right does not extend to "run-of-the-mill" shop floor conversations as, for example, the giving of instructions or training or correction of work technique. In such cases, there should not normally be any reasonable basis for an employee to fear that disciplinary action may result from the examination.

c. Too often, managers assume that the Weingarten right to union representation occurs only during oral investigative examinations of bargaining unit employees. Since most examinations are in fact oral, we sometimes forget that the same

principles for representation apply to written examinations. Written documents designed to elicit information and to require the employees to explain their conduct is considered an examination and meets the criteria set forth in Section 7114(a)(2)(B). These criteria are: (1) the meeting between the employee and management must be an examination; (2) the examination must be in connection with an investigation; (3) the employee must reasonably believe that disciplinary action may result from the meeting; and (4) the employee must request representation.

d. More than likely, situations will occur where an employee will disagree with the supervisor's initial determination that the meeting is not investigatory in nature and will insist on a representative being present. Should this occur, it is important to remember that the controlling factor in determining the existence of an investigatory examination is the employee's belief that disciplinary action may be taken as a result of the examination. The employee's belief, however, must be based on objective rather than subjective criteria. Normally, if the supervisor gives assurances to the employee that the imposition of discipline is not contemplated, the employee's continued belief to the contrary can only be characterized as subjective and, therefore, not reasonable.

e. Exercise of this right may not interfere with legitimate supervisory prerogatives. The supervisor has no obligation to proceed with the examination once an employee has requested union representation and may go forward with an investigation from other sources. The supervisor may, if he or she chooses, advise the employee that the interview will not take place unless the employee is willing to enter the interview alone unaccompanied by a representative. The employee would then be faced with the choice between having an interview without the attendance of a representative or having no interview and foregoing any benefits that might derive from one. Also, the supervisor has no obligation to justify his or her refusal to allow union representation.

f. The supervisor has no duty to bargain with any representative who may be permitted to attend the investigatory interview. In the investigatory setting, the supervisor may insist on hearing only the employee's account of the matter being investigated. The Union representative is present to assist the employee and may attempt to clarify questions, elicit responses, or suggest other employees who may have knowledge of the matter. The supervisor, however, is free to insist that he or she is only interested, at that time, in hearing the employee's own account of the matter.

3 January 2002

g. Any interview to which an employee is summoned which he or she reasonably believes may result in disciplinary action appears to meet the Weingarten test. The characterization of a meeting as a "counseling session" will not remove it from the protection of this provision. The designation of a meeting as "an interview, investigation, or counseling" is immaterial. An employee is entitled under this provision to union representation whenever the circumstances underlying the meeting make it reasonable to envision that a discussion of an employee's conduct might lead to discipline.

h. The Weingarten rule does not provide any right to the employee or the exclusive representative outside the boundaries of the interview and should not be expanded. More specifically, the Weingarten rule does not apply to a meeting where the employee is not interviewed but simply informed of a disciplinary action. It applies to those meetings which are investigatory in nature, where the employee is called upon to explain or defend himself.

i. The right to representation established by this provision applies only to employees in the bargaining unit and permits representation only by the designated area steward.

3. Managers and supervisors desiring assistance and/or further information regarding this subject should contact Labor Relations at 1842.

FOR THE COMMANDER:

//ORIGINAL SIGNED//
DONALD MALLETT
Director, Civilian Personnel
Advisory Center

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"J"

DEPARTMENT OF THE ARMY
HEADQUARTERS, JOINT READINESS TRAINING CENTER AND FORT POLK
FORT POLK, LOUISIANA 71459

NOTICE TO ALL BARGAINING UNIT EMPLOYEES
FROM THE
DIRECTOR, CIVILIAN PERSONNEL ADVISORY CENTER

1. Pursuant to the provisions of the Civil Service Reform Act, this is to advise that effective 11 January 1979 employees in units represented by an exclusive labor organization have the right to request union representation at an examination by a representative of the agency in connection with an investigation if the employee believes the examination may result in disciplinary action.

2. Section 7114(a) of the Civil Service Reform Act of 1978 states that:

"(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at --

(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if --

(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

(ii) the employee requests representation."

3. Therefore, as required by Section 7114(a) (3), you are hereby given annual notice of the right set forth in this provision.

3 January 2002

//ORIGINAL SIGNED//
DONALD MALLET
Director, Civilian Personnel
Advisory Center

DISTRIBUTION:
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A copy of this notice must be posted on all official bulletin boards designated for the posting of materials pertaining to civilian employees. This notice supersedes previous notice dated 3 January 2001.